Southern Finance Bhd (forerly known as United Merchant Finance Bhd) v Sun City Development Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — SUIT NO D 1–22–473 OF 2002
VINCENT NG J
3 JANUARY 2006

Civil Procedure — Summary judgment — Appeal — Summary judgment set aside — Claim on banking facilities — Variation of basis of calculation of interest — Whether plaintiff had failed, neglected and/or refused to provide ledger or a statement of account in regard to the interest imposed and its variations — Whether hearsay evidence can be accepted — Whether first defendant's liability is co-extensive with that of second defendant's — Whether triable issues raised

The plaintiff, a commercial banking institution instituted a suit against the defendants for the recovery of monies due under credit facilities given by the former to the second defendant, which was guaranteed by the first defendant. To secure the repayment of the facilities given to the second defendant a charge was registered in favour of the plaintiff over the first defendant's land. The second defendant defaulted and failed to make repayment on the facilities. The plaintiff sent a letter of demand to both defendants claiming a sum of RM2,904,144.61. The defendants did not respond to the said letters of demand. Pursuant to the terms of the loan facilities and guarantee agreement, the plaintiff disposed the shares that were deposited with the plaintiff by the second defendant as security. The defendants were notified of this share disposal by a letter to them. However, the amount recovered on the share disposal fell short of the amount due and payable to the plaintiff, and the amount due, owing and payable to the plaintiff together with interest was found to be RM3,160,949.19, which amount was to bear additional interest accruing on the default installments at the agreed rate of 2.5% pa above the base landing rate calculated on monthly basis. The plaintiff filed notice of discontinuance of action against the second defendant with liberty to file afresh. The plaintiff proceeded against the first defendant by filing an application for summary judgment under O 14 of the Rules of the High Court 1980 ('the RHC') which was dismissed by the learned senior assistant registrar, hence this appeal.

Held, allowing the appeal:

(1) The loan facility provided that interest to be imposed was on daily rests payable monthly whereas the plaintiff was claiming interest on a monthly rests basis. By doing so, the plaintiff was in effect claiming less interest than what was due from by the defendants under the said facility. Hence, the plaintiff was willing to forego part of the interest due and payable to it. It was clearly uncontrovertible that the first defendant has not been placed in a position of

disadvantage or has been adversely prejudiced, but had indeed benefited under such variation. The law only debars the bank from claiming more, but not less than it is entitled to under the loan agreement. The plaintiff could vary the basis of calculation of interest in favour of the borrower without his consent (see para 18).

(2) The plaintiff had further buttressed its certificate of indebtedness by annexing as exhibits statements of account to show how the sum claimed against the defendants was arrived at. The court was bound to accept the plaintiff's certificate of indebtedness since no manifest error has been shown by the defendants on the face of the certificate (see para 21).

(3) As an application for summary judgment is decided upon affidavit evidence, s 90A(2) of the Evidence Act 1950 was inapplicable. The ambit of s 90A(2) was clearly limited and circumscribed by s 2 of the same Act. An O 14 of the RHC application is an interlocutory proceeding and therefore hearsay evidence could be accepted. The present case which concerned an interlocutory proceeding, clearly comes within the provision of O 41 r 5(2) of the RHC (see paras 23, 26).

(4) Sections 81 and 86 of the Contracts Act 1950 was inapplicable as they concern 'guarantees' and 'sureties', whereas the plaintiff's claim against the first defendant was grounded on a third party charge created by itself in favour of the plaintiff to secure the facility granted to the second defendant. Having agreed to and signed such a closely and tightly worded agreement which ensures recovery of the debt by the plaintiff, it does not lie in the mouth of the defendants to challenge the very thing that they have agreed to (see para 29).

[Bahasa Malaysia summary

Plaintif, sebuah institusi perbankan komersial telah memulakan satu tindakan guaman terhadap defendan-defendan untuk pengembalian semula wang yang kena dibayar di bawah kemudahan kredit yang telah diberikan oleh institusi tersebut kepada defendan kedua, yang mana ianya dijamin oleh defendan pertama. Sebagai jaminan pembayaran semula kemudahan yang telah diberikan kepada defendan kedua satu gadaian telah didaftarkan memihak kepada plaintif ke atas tanah yang dimiliki oleh defendan pertama. Defendan kedua telah ingkar dan gagal membuat bayaran berhubung dengan kemudahan tersebut. Plaintif telah menghantar surat tuntutan kepada kedua-dua defendan menuntut jumlah sebanyak RM2,904,144.61. Defendan-defendan tidak memberi maklum balas kepada surat-surat tuntutan tersebut. Menurut terma-terma kemudahan pinjaman dan perjanjian jaminan, plaintif telah menjual saham-saham yang telah didepositkan dengan plaintif oleh defendan kedua sebagai jaminan. Defendan-defendan telah dimaklumkan mengenai penjualan saham tersebut melalui satu surat yang telah dihantar kepada mereka. Walau bagaimanapun, jumlah yang diperoleh dari penjualan saham tersebut tidak mencukupi bagi melunaskan jumlah yang kena dibayar kepada plaintif, dan jumlah yang kena dibayar kepada plaintif termasuk faedah adalah sebanyak RM3,160,949.19, yang mana jumlah untuk menanggung faedah tambahan yang terakru ke atas ansuran-ansuran yang tertunggak pada kadar yang dipersetujui sebanyak 2.5% setahun di atas kadar pinjaman asas yang dikira

bulanan. Plaintif memfailkan notis pemberhentian tindakan terhadap defendan kedua dengan kebebasan untuk memfailkan semula. Plaintif meneruskan tindakan terhadap defendan pertama enggan memfailkan satu permohonan untuk penghakiman terus di bawah A 14 Kaedah-kaedah Mahkamah Tinggi 1980 ('KMT') yang mana ianya telah ditolak oleh yang arif Penolong Kanan Pendaftar. Plaintif kemudiannya membuat rayuan ini.

Diputuskan, membenarkan rayuan:

(1) Kemudahan pinjaman itu memperuntukkan yang faedah dikenakan pada kiraan harian dan dibayar bulanan manakala plaintif menuntut faedah pada kiraan bulanan. Dengan berbuat demikian, plaintif sebenarnya menuntut faedah yang kurang dari apa yang kena dibayar oleh defendan-defendan di bawah kemudahan tersebut. Dari itu, plaintif bersedia untuk melepaskan sebahagian dari faedah yang perlu dan kena dibayar kepadanya. Ianya jelas bahawa defendan pertama tidak diletakkan di tempat yang merugikan atau telah diprejudiskan, malahan mereka sebenarnya mendapat manfaat dengan perubahan tersebut. Undang-undang hanya menghalang bank dari membuat tuntutan lebih, bukan kurang dari apa yang ia berhak di bawah perjanjian pinjaman itu. Plaintif boleh mengubah asas kiraan faedah yang memihak kepada peminjam tanpa kebenarannya (lihat perenggan 18).

(2) Plaintif seterusnya memperkukuhkan lagi sijil keberhutangannya dengan melampirkan pernyataan-pernyataan akaun untuk menunjukkan bagaimana jumlah yang dituntut terhadap defendan-defendan dikira. Mahkamah terikat untuk menerima sijil keberhutangan plaintif kerana tiada kesalahan yang nyata ditunjukkan oleh defendan-defendan pada muka sijil tersebut (lihat perenggan 21).

(3) Memandangkan permohonan untuk penghakiman terus diputuskan berdasarkan pada keterangan afidavit, s 90A(2) Akta Keterangan 1950 adalah tidak terpakai. Lingkungan s 9A(2) adalah jelas terhad oleh s 2 Akta yang sama. Permohonan di bawah A 14 KMT adalah satu prosiding interlokutori dan dari itu keterangan dengar cakap boleh diterima. Kes semasa yang merupakan satu prosiding interlokutori, jelasnya tergolong di bawah peruntukan A 41 k 5(2) KMT (lihat perenggan 23, 26).

(4) Seksyen 81 dan 86 Akta Kontrak 1950 tidak terpakai kerana ianya berhubung dengan 'jaminan' dan 'penjamin', manakala tuntutan plaintif terhadap defendan pertama adalah berdasarkan pada gadaian pihak ketiga yang dibuat oleh defendan pertama memihak kepada plaintif untuk menjamin kemudahan yang diberikan kepada defendan kedua. Setelah bersetuju dan menandatangani satu perjanjian yang mana perkataan-perkataan yang digunakan di dalamnya jelas menjamin pembayaran semula hutang kepada plaintif, ianya tidak wajar bagi defendan-defendan untuk sekarang ini mempertikaikan sesuatu yang mereka telah persetujui (lihat perenggan 29).]

Notes

For cases on appeal of summary judgment, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index paras 6070–6188.

Cases referred to

Bangkok Bank Ltd v Cheng Lip Kwong [1990] 2 MLJ 5 (refd)
Bank Negara v Mohd Ismail & Ors [1992] 1 MLJ 408 (refd)
Boustead Trading (1985) Sdn Bhd v Arab Malaysian Merchant Bank Bhd [1995] 3 MLJ 331 (refd)
Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor [2006] 2 MLJ 688 (refd)
Chen Heng Ping & Ors v Intradagang Merchant Bankers (M) Bhd [1995] 2 MLJ 363 (refd)
Citibank NA v Ooi Boon Leong & Ors [1981] 1 MLJ 282 (refd)
Cow v Casey [1949] 1 All ER 197 (refd)
D&C Nomura Merchant Bankers Bhd v Gunung Kuari Sdn Bhd [1990] 2 CLJ 58 (refd)
Dobbs v National Banks of Australiasia (1953) 53 CLR 643 (refd)
European Asian Bank AG v Punjab and Sind Bank [1983] 2 All ER 508 (refd)
Ho Chooi Soon v The Indian Overseas Bank Ltd [1961] MLJ 86 (refd)
Ho Lai Ying (trading as KH Trading) & Anor v Cempaka Finance Bhd [2004] 2 MLJ 197 (refd)
Huo Heng Oil Co (Em) Sdn Bhd v Tang Tiew Yong [1987] 1 MLJ 139 (refd)
KGN Jaya Sdn Bhd v Pan Reliance Sdn Bhd [1996] 1 MLJ 233 (refd)
Lin Securities (Pte) v Noone & Co Sdn Bhd (Klang Jaya Bahru Development Bhd, third party) [1989] 1 MLJ 321 (refd)
Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd [1987] 2 MLJ 183 (refd)
Miles v Bull [1968] 3 All ER 632 (refd)
Multi Purpose Bank Bhd v Maimon bte Abdul Razak [1999] 6 MLJ 215 (refd)
Ng Hee Thoong v Public Bank Bhd [1995] 1 MLJ 281 (refd)
Percetakan Solai Sdn Bhd v Kin Kwok Daily News Sdn Bhd & Anor [1986] 1 MLJ 240 (refd)
Perwira Affin Bank Bhd (dahulunya dikenali sebagai Perwira Habib Bank Malaysia Bhd) v Lorrain Esme Osman [1996] 4 MLJ 656 (refd)
Southern Bank Bhd v Shin Huat Joo Enterprise [1998] 3 CLJ 941 (refd)
Syn Lee & Co Ltd v Bank of Chine [1961] MLJ 87 (refd)
Voo Min En & Ors v Leong Chung Fatt [1982] 2 MLJ 241 (refd)

Legislation referred to

Contracts Act 1950 ss 81, 86
Evidence Act 1950 ss 2, 90A(2)
Rules of the High Court 1980 O 14 r 4(1), O 41 r 5(1), (2)

K Sureindhen (Sothi & Ang) for the plaintiff.
Rajvinder Singh (Dennis Nik & Wong) for the defendants.

Vincent Ng J:

FACTUAL BACKGROUND

[1] The facts of the case could shortly be stated thus. The plaintiff, a commercial banking institution instituted this suit against the defendants for the recovery of monies due under credit facilities given by the former to the second defendant, which

was guaranteed by the first defendant. To secure the repayment of the facilities given to the second defendant a charge was registered in favour of the plaintiff over the first defendant's land. The second defendant defaulted and failed to make repayment on the facilities. On 27 February 2001, the plaintiff's counsel sent letter of demand to both Defendants claiming a sum of RM2,904,144.61 as at 19 February 2001. The defendants did not respond to the said letters of demand. Pursuant to the terms of the loan facilities and guarantee agreement, the plaintiff disposed of the shares that were deposited with the plaintiff by the second defendant as security. The defendants were notified of this share disposal by a letter to them dated 14 July 2001 from the plaintiff's solicitors. However, the amount recovered on the share disposal fell short of the amount due and payable to the plaintiff, and the amount due, owing and payable to the plaintiff together with interest as at 28 November 2001 was found to be RM3,160,949.19, which amount was to bear additional interest accruing on the default installments at the agreed rate of 2.5% pa above the base landing rate calculated on monthly basis from 29 November 2001 till the date of full settlement. On 1 April 2003, the plaintiff filed notice of discontinuance of action against the second defendant with liberty to file afresh. The plaintiff proceeded against the first defendant by filing an application for summary judgment under O 14 of the Rules of the High Court 1980 ('the RHC') which was on 16 December 2004 dismissed by the learned SAR, hence this appeal before me.

THE LAW ON (O 14) APPLICATIONS FOR SUMMARY JUDGMENT

(a) Case Authorities

[2] Although I could locate old or very old English case authorities on this topic, due to the demands of the present day economic exigencies being vastly different from those olden times, I shall, on commercial matters, refrain from citing English judicial pronouncements that are essentially based on the particular commercial circumstances and ample availability of judicial time that prevailed during those ancient times. I shall here set out the principal authorities on summary judgments which I consider citable.

[3] Mohamed Azmi SCJ, delivering the majority landmark judgment of the Supreme Court in *Bank Negara v Mohd Ismail & Ors* [1992] 1 MLJ 408 ('Bank Negara') held:

> In our view, basic to the application of all those legal propositions, is the requirement under O 14 for the court to be satisfied on affidavit evidence that the defence has not only raised an issue but also that the said issue is triable. *The determination of whether an issue is or is not triable must necessarily depend on the facts or the law arising from each case as disclosed in the affidavit evidence before the court.* On the treatment of conflict of evidence on affidavits, Lord Diplock speaking in the Privy Council on *Eng Mee Yong & Ors v Letchumanan* had this to say at p 217:
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> > Although in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be.

Although Lord Diplock was dealing with an application for removal of caveat in that particular case, we are of the view that the above principle of law is relevant and applicable in all cases where a judge has to decide a case or matter on affidavit evidence.

Under an O 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other in an affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with the undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable. In our opinion, unless this principle is adhered to, a judge is in no position to exercise his discretion judicially in an O 14 application. Thus, apart from identifying the issues of fact or law, the court must go one step further and determine whether they are triable. This principle is sometimes expressed by the statement that a complete defence need not be shown. The defence set up need only show that there is a triable issue. (Emphasis added.)

[4] Thomson CJ in *Syn Lee & Co Ltd v Bank of Chine* [1961] MLJ 87 had this to say:

With great respect it seems to me there may have been some slight misapprehension on the part of the Assistant Registrar and on the part of the trial Judge as to the proper approach. It is not quite the same as the problem with which we are always being faced in the Chancery side of the Court of trying the issues on affidavit evidence. In a case of this sort it is not a case of trying the issues on affidavit evidence, it is rather a question of deciding on affidavit evidence whether there is a moral improbability of a very high degree that the defendant can possibly succeed. (Emphasis added.)

[5] In the Court of Appeal case of *Ho Chooi Soon v The Indian Overseas Bank Ltd* [1961] MLJ 86, Thomson CJ held at p 87:

For myself I fail to detect any special circumstances in the present case, and in thinking that they are certainly no such circumstances which would justify us in interfering I am fortified by the observations of Mr Justice Wills in the case of *The Electric & General Contract Corporation v The Thomson-Houston Electric Co* where his Lordship said that he did not think O 14 applied to cases raising what might turn out to be a difficult question of law. Such question could not be satisfactorily dealt with at Chambers.

In my view, in the present case, there were not only *certain issues of fact on which the parties were far from being agreed* but there was also a question of law on which I would express no opinion whatsoever beyond the opinion that it was not a simple straightforward question of law. (Emphasis added.)

[6] In *Voo Min En & Ors v Leong Chung Fatt* [1982] 2 MLJ 241, the Federal Court, as expressed through Salleh Abas FJ held, at p 243E:

That being the case, it is not enough for the respondent in answer to the appellants' application to sign final judgment, to raise an issue, or any issue. He must, however, raise such issue as would require a trial in order to determine it. *In other words, the issue raised must be an arguable issue.* But where the issue raised is irrelevant and ineffective, or to use the words of Lord Greene MR in *Cow v Casey* 'when the point is understood and the court is satisfied that it is really unarguable', the appellant should be entitled to what they prayed for in the summons in chambers. (Emphasis added.)

[7] In the English Court of Appeal case of *European Asian Bank AG v Punjab and Sind Bank* [1983] 2 All ER 508, Robert Goff LJ held at p 516a

> Moreover, at least since *Cow v Casey* [1949] 1 All ER 197; [1949] 1 KB 474, *this court has made in pain that it will not hesitate, in an appropriate case, to decide questions of law under O 14, even if the question of law is at first blush of some complexity and therefore takes 'a little longer to understand'. It may offend against the whole purpose of O 14 not to decide a case which raises a clear-cut issue, when full arguments has been addressed to the court, and the only result of not deciding it will be that the case will go for trial and the argument will be rehearsed all over again before a judge, with the possibility of yet another appeal. The policy of O 14 is to prevent delay in cases where there no defence; and this policy is, if anything, reinforced in a case such as the present, concerned as it is with a claim by a negotiating bank under a letter of credit.* (Emphasis added.)

[8] In *Percetakan Solai Sdn Bhd v Kin Kwok Daily News Sdn Bhd & Anor* [1986] 1 MLJ 240. George J held at p 244I:

> Now, on a general principle where a defendant shows that he has a fair case for defence or reasonable grounds for setting up a defence or even a fair probability that he has a bona fide defence he ought to be given leave to defend (*Saw v Hakim*). A defendant should not be shut out from defending unless it is a very clear indeed that he has no case in the action under discussion (*Sheppards v Wilkinson*). The power to give summary judgment under O 14 is 'intended only to apply to cases where there is no reasonable doubt that a plaintiff is entitled to judgment and where therefore it is inexpedient to allow a defendant to defend for mere purposes of delay' (*Jones v Stone*). Where there is any serious conflict as to matters of law arises, summary judgment under Order 14 should not be granted. (*Electric & General Corpn v Thomson-Houston Electric*). But, however difficult the point of law is, once it is understood and the Court is satisfied that it is really unarguable it will give final judgment (*Cow v Casey*).
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> In the instant case, the claim based on the agreement of 20 November 1980 turns on the true construction of the provisions of the agreement which boils down to the question whether the defendants can be allowed to rely on their contention that their accounts had not been audited. All the necessary evidence necessary to adjudge the issue was before the court and the law to be applied is really trite. (Emphasis added.)

[9] The following year, in similar vein, in *Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd* [1987] 2 MLJ 183, Hashim Yeop A Sani SCJ had occasion to express as follows, at p 184D:

> What is involved in the present appeal is the other principle considered I European Asian by Goff LJ (as he then was) that is, what happens when a legal issue is raised by the defence in an O 14 application. In this regard several principles are involved. First, the court hearing an O 14 application should work within the framework of O 14 and not embark on an exercise under O 33 r 2 which empowers the court to determine any question or issue arising in a cause or matter whether of fact or law or partly of fact or partly of law before trial of the cause or matter. Order 33 r 2 is entirely for a different purpose. Secondly, where the issue raised is solely a question of law pure and simple without reference to any facts or where the facts are clear and undisputed the court should exercise its duty under O 14 as in any other cases and decide on the question of law. This is so even if the issue of law raised is a difficult one. If the court after considering the argument is satisfied that it is really unarguable then the court should grant summary judgment. (Emphasis added.)

[10] At p 186, it was further held:

> The underlying philosophy in the O 14 provision is to prevent a plaintiff clearly entitled to the money from being delayed his judgment where there is no fairly arguable defence to the claim. The provision should only be applied to cases where there is no reasonable doubt that the plaintiff is entitled to judgment. Order 14 is not intended to shout out a defendant. The jurisdiction should only be exercised in very clear cases. (Emphasis added.)

[11] However, in *Ng Hee Thoong v Public Bank Bhd* [1995] 1 MLJ 281, the Court of Appeal had occasion to re-examine certain dicta in *Bank Negara*, and speaking through Gopal Sri Ram JCA, had this to say:

> I am conscious of the more robust approach to applications for summary judgment of that has been adopted by our courts more recently. (See the majority judgment in *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400). But I think that in the process the cautionary words of Thompson CJ in *Syn Lee & Co Ltd v Bank of China* [1961] MLJ 87 to which emphasis has been supplied may have been overlooked.
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> It is my respectful view that the passage in the opinion of Lord Diplock in*Eng Mee Yong & Ors v Letchumanan* [1980] AC 331; [1979] 2 MLJ 212 that was quoted by Macdonald J in *Bank of British Columbia* (1985) 57 BCLR 350 and relied upon by the majority in *Bank Negara* is entirely irrelevant to an application for summary judgment. Although the majority decision of the Supreme Court may plainly bind us, I cannot escape the feeling that the minority judgment of Gunn Chit Tuan SCJ (later CJ (Malaya)) and the approach taken by him truly represents the law. It is neither open to me nor is it my place to say anything more about the rather novel decision in *Bank Negara*, but the time may come when the approach there adopted by the majority may have to be reconsidered by the Federal Court in an appropriate case.

[12] In his dissenting judgment, Gunn Chit Tuan SCJ, in the case of *Bank Negara*, had this to say, pp 414–415:

> The scope of O 14 proceedings meant for cases which are virtually uncontested or uncontestable is now determined by the Rules of the High Court 1980. Generally where a defendant *shows that he has a fair case for defence, or reasonable grounds for setting up a defence, he ought to have leave to defend.* Order 14 is not intended to shut out a defendant. The jurisdiction should only be exercised in very clear cases (*Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd*, *Gunung Bayu Sdn Bhd v Syarikat Pembinaan Perlis Sdn Bhd*). *It was held in the well known House of Lords' case of Jacob v Booths's Distillery Co that a complete defence need not be shown. The defence need only show there there is a triable issue or question or that for some other reason* there ought to be a trial, and leave to defend ought to be given. In fact, even though the defence is not clearly established, but only reasonable probability of there being a real defence, leave to defend should be given (*Manger v Cash*). (Emphasis added.)

(b) Analysis of the above cases

[13] In *Ng Hee Thoong*, Gopal Sri Ram JCA, who delivered the Appeal Court's decision, was of the view that in *Bank Negara* the Supreme Court had taken 'the more robust approach to applications for summary judgments' for having countenanced the trying of issues on affidavit evidence which Thomson CJ had cautioned against

in *Syn Lee*. With great respect, after a careful reading of *Bank Negara*, I am unable to hold the same conclusion as my learned brother Gopal Sri Ram. In the impunged passage in *Bank Negara*, where Mohamad Azmi SCJ had said: 'Although Lord Diplock was dealing … where a judge has to decide a case on affidavit evidence", it is important to note that he took pains to couch his expression with the words 'where a judge has to decide a case or matter on affidavit evidence' rather than 'try the issues on affidavit evidence' which later phrase was what Thomson CJ had used in *Syn Lee*. The law is trite that it is not sufficient for the defendant to merely deny the debt but he must condescend upon any cogent facts which negative the existence of the debt or which show that the claim is not maintainable on other grounds (see *Huo Heng Oil Co (EM) Sdn Bhd v Tong Tiew Yong* [1987] 1 MLJ 139). It would follow that Mohamed Azmi SCJ was entirely correct to hold that: 'Where such assertions or denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent or is inherently improbable in itself, then the judge has a duty to reject such assertions or denial, thereby rendering the issue not triable.' I hold this view because if the defendant's denial or dispute is, eg inconsistent with undisputed contemporaneous documents or other statements by the same deponent, or is inherently improbable in itself then surely, there would be, in the words Thomson CJ in *Syn Lee*, 'improbability of a very high degree that the defendant can possibly succeed …' Considering that, the policy and designed purposed of the O 14 provision is to prevent delay and deny the plaintiff his judgement who is clearly entitled to the money in cases where there is no defence, and also mindful that since most defendants are wont to deny the debt, if the court is precluded from deciding on affidavit evidence when faced with conflicting bare assertions in affidavits which, I must hasten to add, do not ipso facto become conflicting evidence — while no doubt bearing in mind that the decider ought not to try issues on affidavit evidence — then we might as well scrap the O 14 provision for being purposeless. Here, let me restructure and express my thoughts in simple English. The general function of a judge is to determine cases based upon evidence adduced either viva voce or by affidavits — in the former case the issues are tried and in the latter, the judge merely study the affidavits, hear arguments and determine whether there are issues to be tried. The O 14 procedure is specially designed to cater for the latter case. Clearly, in *Bank Negara*, Mohamed Azmi SCJ had kept, in the forefront of his mind, this distinction as he had expressed himself thus: 'where a judge *has to decide a case or matter (and not try issues) on affidavit evidence*', coupled with the expression 'the determination of whether an issue is or is not triable must necessarily depend on the facts or the law … *as disclosed in the affidavit evidence before the court.*' With respect, I cannot see any reason for the Federal Court to revisit the ratio in *Bank Negara*. (Emphasis added.)

[14] High case authorities argued by competent advocates and decided by eminent judges have consistently established certain well settled principles to guide the courts in determining, after having studied the affidavit evidence and heard arguments, whether leave to defend should be allowed. It is ever so often in the practice or administration of law that a competent advocate or a perceptive judge could display his or her innate, uncluttered, beautiful mind. I shall here set out the guiding principles:

(1) he court will not hesitate, in an appropriate case under O 14, to decide questions of law of some complexity once it is understood and the court is satisfied that it is really unarguable. (see *Cow v Casey* [1949] 1 All ER 197. This principle has been applied by the English Court of Appeal in *European Asian Bank v Punjab and Sind Bank*, and also the Malaysian courts, as in *Percetakan Solai Sdn Bhd v Kim Kwok Daily News Sdn Bhd & Anor*.

(2) The underlying philosophy in the O 14 provision is to prevent a plaintiff who is clearly entitled to the money from being delayed his judgment where there is no fairly arguable or reasonable defence to the claim, either in law or on fact. See *Malaysian Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd*; *Cow v Casey* and *Voo Min En & Ors*.

(3) The defendant should be allowed to defend where the court is satisfied from certain factual features pertinent to the issues raised, that there are circumstances that ought to be investigated at a trial. See *Miles v Bull* [1968] 3 All ER 632.

(4) It is not sufficient for the defendant to merely deny the debt; he must plead any cogent and relevant facts which negative the existence of the debt or which show that the claim is not maintainable on other grounds. See *Huo Heng Oil Co (Em) Sdn Bhd v Tang Tiew Yong* [1987] 1 MLJ 139.

(5) When one party makes a positive assertion in affidavit on a material issue, failure of the opponent to contradict by averment, also in affidavit, is usually treated as an admission of the fact so asserted. See *Ng Hee Thong & Anor v Public Bank Bhd*; see also *Perwira Affin Bank Bhd (dahulunya dikenali sebagai Perwira Habib Bank Malaysia Bhd) v Lorrain Esme Osman* [1996] 4 MLJ 656 at p 657.

(6) If the defendant has, by his conduct, lulled the plaintiff into the belief that there is no real dispute on the claim, such as, where there is an absence of dispute for a significant period of time, on the amount alleged in the letter of demand to be due, or as to the acceptance of the goods, then he is estopped from denying the particular amount claimed or the fact alleged. See *Boustead Trading (1985) Sdn Bhd v Arab Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331; and *KGN Jaya Sdn Bhd v Pan Reliance Sdn Bhd* [1996] 1 MLJ 233. I am completely ad idem with the views of the Court of Appeal in *KGN Jaya* — speaking through Gopal Sri Ram JCA — on the untenable conduct of the defendant, in the following language:

> When asked why his client had kept silent for a rather long period of time, Encik Darshan Singh's response was that his client was a large company and did not do anything until the letter before action was received. We trust that we well be forgiven if we are unable to detect the logic in this response.
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> We are of the view that it would be a travesty of justice if we were to accede to the appellant's arguments. We are left in no doubt that the undisputed facts of this case admit of the conclusion that the respondent was, by the conduct of the appellant, lulled into the belief that the appellant had no challenge to the accounts, leave alone the legal relationship between the parties.
>
> To put it another way, the appellant, by its silence coupled with the other circumstances of the case, encouraged the respondent to believe that it intended to

raise no challenge to the existence of a prior legal relations between the parties or to the figure which the account showed as owing by it. Having done so, it ought not to be permitted to now contend otherwise.

It follows that it does not, therefore, lie in the mouth of the appellant to now deny the respondent's claim. It would be plainly inequitable to do so. An examination of the facts leads us to this conclusion. The legal basis upon which such a conclusion may be sustained is well-settled and is now beyond question. See *Boustead Trading (1985) Sdn Bhd v Arab Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331.

(7) A welter of authorities emanating from all levels of our courts and courts in England, Singapore and Australia have constently entrenched the principle that a clause in the loan agreement which, due to the dictates of commerce, provide that a certificate of indebtedness is conclusive evidence of both liability and the amount of the debt, should be accorded its intended effect unless fraud or manifest error on the face of such certificate could be shown. See *Dobbs v National Banks of Australiasia* (1953) 53 CLR 643; *Citibank NA v Ooi Boon Leong & Ors* [1981] 1 MLJ 282; *D&C Nomura Merchant Bankers Bhd v Gunung Kuari Sdn Bhd* [1990] 2 CLJ 58; *Bangkok Bank Ltd v Cheng Lip Kwong* [1990] 2 MLJ 5; *Southern Bank Bhd v Shin Huat Joo Enterprise* [1998] 3 CLJ 941; and *Chen Heng Ping & Ors v Intradagang Merchant Bankers (M) Bhd* [1995] 2 MLJ 363 (CA), which was affirmed by the Federal Court in *Cempaka Finance Bhd v Ho Lai Ying & Anor* [2006] 2 MLJ 685. In *Cheng Lip Kwong*, Yong Pung How J (as he then was) had this illuminating rationale to his decision when he said:

> The widespread use by banks of 'conclusive evidence' clauses has arisen simply because of the dictates of commerce, and has been supported by the assumption that money institutions, which are themselves closely regulated by the law, are completely honest and reliable. In *Bache & Co (London) Ltd v Banque Vernes et Commerciale de Paris SA* [1973] 2 Lloyd's Rep 437, Lord Denning MR said at p 440:
>
> > I would on add this: this commercial practice (of inserting 'conclusive evidence' clauses) is only acceptable because the bankers or brokers who insert them are known to be honest and reliable men of business who are most unlikely to make a mistake. Their standing is so high that their word is to be trusted. So much so that a notice of default given by a bank or a broker must be honoured. It ranks as equivalent to, if not higher than, the certificate of an arbitrator or engineer in a building contract. As we have repeatedly held, such a certificate must be honoured, leaving any cross-claims to be settled later by an arbitrator. So if a banker or broker gives a notice of default in pursuance of a 'conclusive evidence' clause, the guarantor must honour it, leaving any cross-claims by the customer to be adjusted in separate proceedings.
>
> What is significant is that, in the absence of fraud or obvious error on the face of it, a certificate issued under a 'conclusive evidence' clause is conclusive of both the liability and the amount of the debt.

(8) Since O 14 r 4(1) provides that a defendant may show cause against an application for summary judgment by affidavit or otherwise, even if a defence has been filed, the trite principle that a party is circumscribed by his pleadings is inapplicable against the defendant in such O 14 proceedings. See *Lin Securities (Pte) v Noone & Co Sdn Bhd (Klang Jaya Bahru Development Bhd,*

> *third party)* [1989] 1 MLJ 321. However, despite the words 'or otherwise' appearing in the phrase 'by affidavit or otherwise' in O 14 r 4(1), yet the defendant must always be mindful of the well settled principle that a positive assertion in the plaintiff's affidavit on a material issue could not be challenged or contradicted through mere written or oral submissions.

ISSUES RAISED BY THE FIRST DEFENDANT IN RESISTING THE plaintiff SUMMARY JUDGMENT'S APPLICATION

[15] Before the SAR, the first defendant raised three issues in resisting summary judgment, and, guided by the above principles, I shall now examine them *in seriatim*.

[16] Each of the above issues raised is now examined.

(i) The first issue

[17] It was the first defendant's contention that the plaintiff had unilaterally varied the scheme of calculation of interest from daily rests payable monthly to monthly rests basis. The said facilities, as evidenced by the letter of offer dated 10 February 1996 and the loan agreement dated 27 May 1996, stipulated the interest was to be charged at 2.5% pa above the base lending rate on daily rest basis payable monthly. Whereas, the plaintiff vide its summons in chambers for summary judgment and affidavit in support claimed interest at 2.5% pa above the base lending rate on monthly rests basis. Thus, the first defendant argued that the plaintiff had, without the defendant's consent, unilaterally changed the scheme of interest calculation. The first defendant's counsel submitted that the plaintiff had no right to vary the basis of calculation of interest even though the first defendant would benefit under such variation whereby the amount claimed is indeed lower than the interest due if calculated at the agreed daily rest basis. The case of *Multi Purpose Bank Bhd v Maimon bte Abdul Razak* [1999] 6 MLJ 215 ('*Maimon*') was cited in support of this argument wherein it was held, at p 219:

> that it is immaterial whether the chargor would benefit by this substituted factor of calculating rate of interest (as in this case, the defendant will be paying a lower interest). What is more important is that no change can be permitted unless agreed upon. To compromise this may have an adverse effect when the calculation of outstanding sum may on the contrary, in certain situation, be a disadvantage to the chargor.

[18] The learned judge was of the opinion if a bank were to vary the factor of calculating the rate of interest without the borrower's consent it would create a disadvantage to the borrower as it had an 'adverse effect' on 'the calculation of outstanding sum'. In that case the bank had claimed interest on a yearly rests basis whereas the loan facility had provided for monthly rest basis. In the instant case, the loan facility provides that interest to be imposed is on daily rests payable monthly whereas the plaintiff is claiming interest on a monthly rests basis. By doing so, the plaintiff is in effect claiming less interest than what is due from by the defendants under the said facility. Hence, the plaintiff is willing to forego part of the interest due and payable to it. It is clearly uncontrovertible that the first defendant has not been

placed in a position of disadvantage or has been adversely prejudiced, but had indeed benefited under such variation. I would, with respect, differ from the dicta expressed in *Maimon*. Be that as it may, the learned judge's decision in *Maimon* has been rightly overturned by the Court of Appeal on 2 November 2002, vide appeal case No W02–470 of 1999. In my judgment, the law only debars the bank from claiming more, but not less than it is entitled to under the loan agreement. In my judgment, as the plaintiff could vary the basis of calculation of interest in favour of the borrower without his consent, the defendant's first issue must fail.

(ii) The second issue

[19] The second issue raised by the first defendants is that the plaintiff had failed, neglected and/or refused to fulfill its request to provide ledger or a statement of account in regard to the interest imposed and its variations so that the first defendant would know how the alleged outstanding sum was arrived at. It was argued that without those documents, the first defendant could not ascertain whether the interest was calculated on daily rests basis or monthly rests basis, or know the date or dates of the variation and imposition of the base landing rate. The case of *Ho Lai Ying (trading as KH Trading) & Anor v Cempaka Finance Bhd* [2004] 2 MLJ 197 was cited in support of this argument. In that case, the appellant had challenged the correctness of plaintiff's certificate of indebtedness as the respondent had failed to produce any supporting document such as statement of account to show the quantum claimed, also because the respondent had imposed additional interest of 1% over and above the sum claimed as due and owing. In *Ho Lai Ying*, Court of Appeal held that the bank's certificate of indebtedness would be conclusive evidence (unless a manifest error in the certificate is shown by the defendant) only if the bank's affidavit in support of its application for summary judgment had illustrated how the sum claimed was arrived at. However, the decision of the Court of Appeal in *Ho Lai Ying* was reversed by the Federal Court in *Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor* [2006] 2 MLJ 688 which decided in favour of the Appellant (who was the plaintiff at the High Court level) on the second question posed to it, expressed as:

> Whether apart from producing a certificate of indebtedness pursuant to the contract which provided that the certificate was final and conclusive of the matters stated therein, the appellant had a further obligation to produce statements of account to prove the debt in an application for summary judgment.

[20] Whereas, the Court of Appeal had taken the position that the conclusiveness of the certificate of indebtedness (exh P3) was binding only upon the parties and that the court would still have to determine whether sufficient evidence had been adduced to prove quantum and correctness of the amount claimed, the Federal Court had held that no further obligation is placed on a financial institution to backup their certificate of indebtedness through eg bank statements to prove the debt in a summary judgment application.

[21] In any event, in the present case, the plaintiff had further buttressed its certificate of indebtedness by annexing as exhibits statements of account, being

exhs SFB-14 and SFB-3 of encll 20 and 24 respectively, to show how the sum claimed against the defendants was arrived at. Thus, I am bound to accept the plaintiff's certificate of indebtedness since no manifest error has been shown by the defendants on the face of the certificate.

[22] It was further contented that as the particulars in the statement of account provided by the plaintiff in its affidavit in support is in the form of a computer print-out, which is not verified by a certificate certifying that the computer was operating properly when the statements of account was produced, as required by s 90A(2) of the Evidence Act 1950 ('the Act'), such computer print-out should not be admitted as evidence. Section 90A(2) states as follows:

> For the purposes of this section it may be proved that a document was produced by a computer in the course of its ordinary use by tendering to the court a certificate signed by a person who either before or after the production of the document by the computer is responsible for the management of the operation of that computer. Or for the conduct of the activities for which that computer was used.

[23] On this aspect of the challenge, I would hold that, as an application for summary judgment is decided upon affidavit evidence, s 90A(2) is inapplicable. The ambit of s 90A(2) is clearly limited and circumscribed by s 2 of the same Act, which stipulated the following caveat:

> 2. Extent
>
> This Act shall apply to all judicial proceedings in or before any court, but not to affidavits presented to any court or officer nor to proceedings before an arbitrator.

[24] In no uncertain terms this provision makes clear that the Act does not apply in cases decided upon affidavit evidence. A further point to note is contained in the passage in *Evidence Practice & Procedure* (2nd Ed) where the author Mr Augustine Paul (as he then was) correctly expressed (at p 639) the following opinion:

> Sections 90A, 90B and 90C of the Act relate to documents produced by computers and were introduced by the Evidence (Amendment) Act 1993 (Act A 851) with effect from 15 July 1993. This section is an exception to the hearsay rule and provides that *a document produced by a computer or a statement contained in such document shall be admissible as evidence of any facts stated therein whether or not the person tendering the same is the maker of such documents or statement. It applies to criminal and civil proceedings.* (Emphasis added.)

[25] Though under O 41 r 5(1) of the RHC, 'an affidavit may contain only such facts as the deponent is able of his own knowledge to prove', yet under r 5(2), of the same order, affidavits 'sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources or grounds thereof'. Order 41 r 5 of the RHC reads as follows:

> 5 Contents of affidavit
>
> (1) Subject to Order 14 rules 2(2) and 4(2), to paragraph (2) of this rule and to any order made under Order 38 rule 3, an affidavit may contain only such facts as the deponent is able of his own knowledge to prove.

A (2) An affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof.

[26] Order 14 application is an interlocutory proceeding and therefore hearsay evidence could be accepted. The present case which concerns an interlocutory B proceeding, clearly comes within the provision of O 41 r 5(2). In any event, as Pn Rohani bte Idris and En Zubir bin Mohamed were managers in the corporate recovery division of the plaintiff's and the facts stated in their affidavits were based on their own knowledge as well as on records and documents kept at the plaintiff's office, to which they had access and control, I would hold that the requirements of O 41 r 5(1) have also been fulfilled. I, would therefore, rule that the affidavits filed C as well as the supporting documents exhibited in the plaintiff's affidavits are admissible, and I find no merit in the first defendant's second issue.

(iii) The third issue

D **[27]** The first limb of the third and last issue put forward by the first defendant is that its liability is co-extensive with that of second defendant's and that if the second defendant is not liable, it is argued that the first defendant is also not liable. And, the second limb concerns the alleged variation of the terms of the contract between the plaintiff and the second defendant. On both limbs, the first defendant relied heavily E on ss 81 and 86 of the Contracts Act 1950 which states as follows:

> Surety's liability
>
> 81. The liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract.
>
> F Discharge of surety by variance in terms of contract
>
> 86. Any variance, made without the surety's consent, in the terms of the contract between the principal debtor and the creditor, discharges the surety as to transactions subsequent to the variance.

G **[28]** The answer to the first limb (based on s 81) of this contention could be found in Section 10.03 of the agreed terms in the Annexture to the charge dated 8 June 1988 which reads that: 'Although as between the chargor and the borrower, the chargor is a surety only for the borrower, yet as between the chargor and the lender (chargee), the chargor shall be a principal debtor and the said land herein charged H shall be the principal security for the moneys due under this charge …'. Consequently, if by expressly agreed terms, the first defendant is deemed the principal debtor, surely the first defendant's liability cannot be dependant on the second defendant's liability. Section 4.02 of the same document establishes the nexus between the loan agreement and the Annexture to the charge in that: 'All the I provisions of the loan agreement (dated 27 May 1996) shall be deemed to be incorporated into and form part of this charge (whether such provisions are repeated herein or not) subject to such alterations or variations where necessary to make the provisions of the loan agreement consistent with the provisions of this charge.' Furthermore, Section 7.06 further allows the plaintiff the express right to commence action to recover the debt without first having to exhaust its remedy to sell the land

and the plaintiff shall also have the right to exercise all or any of the remedies available. This section provides that: 'the chargor hereby irrevocably and unconditionally agrees and consents to the lender commencing proceedings, enforcing other remedies or exercising any other rights which the lender may have against the chargor or any other security party simultaneously and concurrently with and without having exhausted its right to sell or to proceed against the said land.'

[29] On the second limb of the challenge, cl 17 of the said loan agreement (dated 27 May 1996), which is incorporated into the charge, clearly allows the lender 'to vary at its absolute discretion and at any time or from time to time such rate or rates of interest and/or the lender's base lending rates and/or the margin and/or the method of calculation of interest'. Thus, clearly s 86 is of no assistance to the first defendant and its challenge is untenable. In any event, both ss 81 and 86 are inapplicable as they concern 'guarantees' and 'sureties', whereas the plaintiff's claim against the first defendant is grounded on a third party charge created by itself in favour of the plaintiff to secure the facility granted to the second defendant (see para 7 of the statement of claim). I must add that, having happily agreed to and signed such a closely and tightly worded agreement which ensures recovery of the debt by the plaintiff, it does not lie in the mouth of the defendants to challenge the very thing that they have agreed to. In the upshot, the third issue raised by the first defendant is also not in its favour.

[30] I have anxiously and carefully gone over the written submissions that were made by learned counsel as well as the cause papers, and have to conclude that this is a suitable case to dispose of under O 14 of the RHC. Hence, the plaintiff's appeal is allowed with costs.

[31] In postlude, I take this occasion to make the following observation. The courts should not too readily find triable issues in cases which concern loans to borrowers from banks and other financial institutions. If such institutions are obliged to wait for a lengthy period of many years — that a full trial and appeal process would often entail — in order to recover loans made to borrowers, then commercial investments from such institutions in this country would be adversely affected, not to mention the cash flow problems that they would encounter. It would be prudent for courts, when dealing with applications for summary judgments in such cases, to apply, in appropriate cases, the estoppel and the finality-of-certificate-of- indebtedness principles as set out in 6 and 7 above.

Appeal allowed.

Reported by Peter Ling